Nos. 23-373, 23-416, 23-635

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee/Cross-Appellant

v.

KAULANA ALO-KAONOHI AND LEVI AKI, JR.,

Defendants-Appellants/Cross-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

BRIEF FOR THE UNITED STATES AS APPELLEE/CROSS-APPELLANT

CLARE E. CONNORS
United States Attorney
District of Hawaii

CRAIG S. NOLAN
Assistant U.S. Attorney
United States Attorney's Office
Room 6-100
PJKK Federal Building
300 Ala Moana Blvd.
Honolulu, Hawaii 96850
(808) 541-2850

KRISTEN CLARKE
Assistant Attorney General

ERIN H. FLYNN
YAEL BORTNICK
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 616-8271

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

STATUTES:

STATUTES (continued): **PAGE**

SENTENCING GUIDELINES:

RULE:

LEGISLATIVE HISTORY:

MISCELLANEOUS: **PAGE**

STATEMENT OF JURISDICTION

These consolidated appeals are from final judgments in a criminal case. The district court had jurisdiction under 18 U.S.C. 3231; it entered final judgment against each defendant on March 6, 2023 (1-ER-2-8; SER-16-22), and amended judgments, ordering restitution, on April 10, 2023 (Aki-ER-4-11; SER-8-15).[1] Defendant Alo-Kaonohi filed a timely notice of appeal on March 9, 2023. 6-ER-995-997. Defendant Aki filed a timely notice of appeal on March 15, 2023. Aki-ER-142-143. The United States filed a timely notice of cross-appeal on April 10, 2023. SER-5-7. This Court has jurisdiction under 28 U.S.C. 1291 and 18 U.S.C. 3742.

STATEMENT OF THE ISSUES

This case arises under the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, Div. E, 123 Stat. 2835 (2009). Among other things, that statute criminalizes certain violent acts undertaken "because of [a victim's] actual or perceived race." 18 U.S.C. 249(a)(1). A jury

---

[1] Citations to "__-ER-__" refer to the volume and page numbers in Alo-Kaonohi's Excerpts of Record. Citations to "Aki-ER-__" refer to the page numbers in Aki's Excerpts of Record. Citations to "SER-__" refer to the page numbers in the United States' Supplemental Excerpts of Record filed with this brief. Citations to "Br. __" and "Aki Br. __" are to page numbers in defendant-appellant Alo-Kaonohi's Opening Brief and defendant-appellant Aki's Opening Brief, respectively. "PSR __" and "Aki PSR __" refer to Alo-Kaonohi's and Aki's presentence reports, by page number. "GX __" refers to government trial exhibits.

found defendants Kaulana Alo-Kaonohi and Levi Aki, who are Native Hawaiians, guilty of one count of violating Section 249(a)(1) for their racially motivated attack on their white neighbor, C.K.[2] This appeal raises the following issues:

1. Whether the district court properly instructed the jury on but-for causation; whether the government properly described but-for causation during closing argument; and, if not, whether any error in the jury instructions was plain or in the closing argument was harmless.

2a. Whether 18 U.S.C. 249(a)(1) is constitutional as applied to defendants' racially motivated attack on their neighbor.

2b. Whether applying Section 18 U.S.C. 249(a)(1) to defendants violates principles of federalism.

3. Whether binding precedent forecloses defendants' facial constitutional challenge to 18 U.S.C. 249(a)(1).

4. When sentencing Aki, whether the district court correctly applied a two-level obstruction of justice enhancement under Sentencing Guidelines § 3C1.1 for defendants' theft and destruction of the cellphone C.K. used to record his assault.

[2] This brief refers to crime victims by their initials to protect their privacy.

5. Whether, in sentencing both defendants, the district court procedurally erred in declining to apply the three-level hate-crime enhancement under Sentencing Guidelines § 3A1.1(a).

STATEMENT OF THE CASE

A. Factual Background

1. C.K. purchases property in Kahakuloa Village.

In 2013, C.K., who was from Arizona, bought a property in Kahakuloa Village on the island of Maui. 2-ER-118, 122; SER-111-114. C.K.'s wife had recently been diagnosed with multiple sclerosis and, on the advice of doctors, the couple had decided to retire to Hawaii for a less stressful life. 2-ER-118, 120-121. They had visited Kahakuloa before, and they enjoyed its friendly atmosphere and beautiful scenery. 2-ER-122-123.

C.K. bought a house in Kahakuloa that his wife had found online. 2-ER-129, 133; SER-110. Title to the property included an access easement, which gave C.K. permission to access his property from the highway. 2-ER-136; SER-111-114, 116-127. C.K. sought a property survey, and he bought title insurance "to make sure everything [was] correct." 2-ER-137, 180. Before buying the property, C.K. also spoke with the listing agent about the property's condition. 2-ER-132. The agent informed C.K. that the house required renovations to make it habitable,

including mold eradication, a water source, and roof and window repairs. 2-ER-132.

C.K., who had experience in construction, planned to do many renovations himself but hired a contractor to complete the necessary mold remediation before he flew to Hawaii. 2-ER-133, 138-139. After the contractor, who was white, tried to access the property, he called C.K. from the local police station to tell him that he had been assaulted. 2-ER-142. C.K. then reached out again to the listing agent, who explained that "the neighborhood was a close-knit community of more Native Hawaiians and that they had a problem with White people moving into the neighborhood." 2-ER-144.

2. Native Hawaiian villagers confront C.K. as he begins renovating the property.

Mindful of the dangers but committed to making good on the promise he had made to his wife, C.K. traveled to Hawaii in January 2014 with his uncle and two friends to begin renovations. 2-ER-144-145. C.K. sent a shipping container from Arizona with his truck, tools, and supplies. 2-ER-146. He and his wife created a binder with pictures of what his wife wanted the house to look like, information about his new neighbors so that he could address them respectfully by name, and copies of legal documents, including his title and easements. 2-ER-149. Given the assault on the contractor and his conversation with the listing agent, C.K. wanted to be prepared with "anything that [he] could do to kind of de-escalate any

situation that could come up." 2-ER-149-150. Just to be safe, C.K. also brought two pistols and installed a security camera system on his truck. 2-ER-146.

C.K. and his friends first visited the property on February 7, 2014. 2-ER-148. C.K.'s property had a shared driveway leading to the house, which was separated from the highway by two gates. 2-ER-129, 150. As the group drove into the village, Alo-Kaonohi's younger brother ran down to the driveway and slammed one of the gates into C.K.'s truck. 2-ER-151. C.K., however, was already partway through the gate and was able to drive the rest of the way to his property where he began unloading supplies. 2-ER-152. While doing so, one of C.K.'s friends saw a different man run down to lock the gate to the village and then run back to his house. 2-ER-157-159. Since C.K. did not have a key, he and his friends were effectively locked in. *See* 2-ER-157-159. C.K. was sad that this was his welcome to the community, and he also was concerned about this "unusual and unpredictable" behavior. 2-ER-157-158.

After C.K. and his friends had finished for the day, they tried to leave through the locked gates. Because no signs explained how to open the gates, C.K. lacked cell phone service, and C.K. was wary of going onto anyone else's property, C.K. "honked" and "yelled" at each gate, but no one answered. 2-ER-158-159. C.K. then cut the last link of the chains used to lock each gate so that he could drive through to the highway. 2-ER-159-160. He intentionally chose to the cut the

last link so that the chain would remain long enough to use. 2-ER-159. C.K. also made sure to close the gates behind him and wrap the chain around so the gate looked locked. 2-ER-159-160. As C.K. replaced the chain, the man who had earlier locked the gate came out and told C.K. that "this is a Hawaiian village" and "the only thing coming in from the outside is the electricity." 2-ER-160, 166; GX 1 at 1:15-1:24.[3]

3. C.K. seeks to de-escalate the situation in the village.

C.K. drove to a police station to report what had happened and to see if the police had ideas on how to handle the situation. 2-ER-168-170. At first, the police suggested visiting the village together the next morning. 2-ER-170. When C.K. returned the next day, however, a police officer questioned whether C.K. had a valid easement. 2-ER-171-172. To resolve the conflict, C.K. obtained additional documentation of the easement from the county records office. 2-ER-174-176; SER-115. He also spoke with the surveyor and the title company, who likewise confirmed the easement. 2-ER-177.

C.K. presented the information to the police, who told him that an officer would meet him in Kahakuloa to "talk to the neighbors and facilitate [his] entry to

[3] On the same day the United States filed this brief, it also filed a motion to transmit Exhibits 1, 2, 3G, 21, and 50 as part of its supplemental excerpts of record. *See* Motion, C.A. Doc. 32, No. 23-635 (filed Feb. 14, 2024).

[his] property in a peaceful de-escalated manner." 2-ER-178. C.K. went to the village and waited, but no one showed up. 2-ER-178. C.K. returned to the police department and was told that his "situation" was being turned over "to the visitors orientation police department." 2-ER-179.

Continuing to seek a peaceful solution, C.K. then discussed his problem with the visitors police, who advised him to get a new survey that marked the easement's exact location. 2-ER-179-180. Despite having already paid for a survey when he bought the property, C.K. paid $1500 for a second survey, hoping that "it would help communicate, de-escalate, anything." 2-ER-180.

The survey was set for February 13, 2014. 2-ER-180. C.K. requested a police escort to ensure the safety of the surveyors, but the police declined. 2-ER-180-181. Worried about "perception," C.K., his friends, and his uncle parked on the side of the highway during the survey so they would not be seen as "coming in hard." 2-ER-181-182. C.K.'s group did a walkthrough with the surveyors to ensure they understood their legal rights. 2-ER-182-183, 186, 194-195; GX 21. The survey confirmed that C.K. had a valid easement. 2-ER-182, 185-186; GX 21.

During the survey, the gates were open. 2-ER-186. But after the surveyors left, the same neighbor again locked the gates to keep C.K. from driving to his property. 2-ER-186-187. Despite C.K.'s requests, the neighbor refused to open the gate, telling C.K. "[y]ou're not welcome here." 2-ER-187. Feeling he had no

other choice, C.K. again cut the chain so he could drive to his property. 2-ER-187. Another neighbor followed C.K. down the road, honking and yelling "there's no fucking access for you guys" and "[y]ou don't even belong in Hawaii." 2-ER-188-189, 191; GX 2 at 1:28.

4. Defendants Alo-Kaonohi and Aki assault C.K. and his uncle.

C.K.'s group reached the house and unloaded supplies. 2-ER-194. His friends left, while C.K. and his uncle, K.K., stayed at the property to begin work. 2-ER-195. K.K. was in the carport and C.K. was upstairs when defendants Alo-Kaonohi and Aki entered the property and angrily confronted them. 2-ER-195. C.K. tucked his gun into his pants, took out his phone to begin filming, and went downstairs. 2-ER-196-197. C.K. and his friends had recorded some of their earlier interactions with neighbors and, based on that experience, C.K. believed that it could de-escalate the situation if defendants knew that he was recording them.[4] 2-ER-197.

[4] Although the parties were unaware at the time, the surveillance system on C.K.'s truck was also running. 2-ER-235-238; 4-ER-641-642; *see generally* GX 3G (video of assault with subtitles). The video captured audio and video of the confrontation in the carport area, but it did not capture video (and only faintly captured audio) of the second-story porch, where most of the attack took place. 2-ER-242-244. Additionally, the assault is partially inaudible on the recording because, at some points, different people were speaking simultaneously, drowning out the statements that were made farther away. *See* 3-ER-447-451; GX 3G at 3:33-4:18).

Alo-Kaonohi noticed C.K. and chased him back up the stairs. 2-ER-198. Aware that C.K. was filming, Alo-Kaonohi told C.K. that he was going to "fly your fucking phone." GX 3G at 1:06; *see also* 2-ER-204. Alo-Kaonohi reached C.K. at the first landing, grabbed C.K. by the hair, and began yelling at him. 2-ER-198-199. Alo-Kaonohi bent C.K. over the railing and punched him multiple times "around [C.K.'s] face and neck area." 2-ER-198-199. During the assault, Alo-Kaonohi threatened C.K. and told him "you don't belong here," called him a "*Haole*[5] fucker," and said that C.K. had "the wrong fucking color skin." 2-ER-202.

Alo-Kaonohi ordered C.K. to "[g]et all [his] shit and get out" because "[n]o fucking *Haole* is ever going to live in this neighborhood." 2-ER-206; *see also* GX 3G at 1:53-2:35. He repeatedly told C.K., "you don't belong here" and demanded that C.K. give him the "fucking phone." GX 3G at 1:56-2:41, 10:30-10:39. Aki walked upstairs and handed a shovel to Alo-Kaonohi, who used it to strike C.K. in the back of the head. 2-ER-204-205; 2-ER-269; GX 3G at 4:17-5:05. Despite C.K.'s obvious injuries, Alo-Kaonohi and Aki continued to yell at C.K. to "pack [his] shit and get the fuck out of here." GX 3G at 5:13-8:44.

---

[5] "Haole," as explained by this Court, is "a Hawaiian term, sometimes used derogatorily, referring to persons of the Caucasian race." *Campbell v. Hawaii Dep't of Educ.*, 892 F.3d 1005, 1010 n.1 (9th Cir. 2018) (citation and internal quotation marks omitted).

As C.K. complied—starting to pack and move his belongings—Alo-Kaonohi noticed the handgun tucked into C.K.'s waistband. 2-ER-206-208; GX 3G at 13:25-13:45. Alo-Kaonohi and Aki chased C.K. onto the second-story porch and began punching him. 2-ER-209. Rather than use his gun in self-defense, C.K. threw the gun away because he did not want to shoot anyone. 2-ER-209-210. But doing so caused C.K. to expose his head and face. 2-ER-210. Aki took advantage of C.K.'s vulnerability and hit C.K. with the shovel in the bridge of C.K.'s nose, punched him, and head-butted him, causing C.K. to pass out. 2-ER-210-211. When C.K. regained consciousness, either Alo-Kaonohi or Aki was kicking him in the ribs, while they both repeatedly insulted C.K., saying things such as "[f]uck you," "[f]uck White people," and "fucking *Haoles*" and threatening to kill him with his own gun. 2-ER-212-213. Alo-Kaonohi or Aki also yanked C.K.'s gold chain from his neck and threw it toward the ocean, and they took his phone, car key, and a clip for the gun from his pocket. 2-ER-212-213.

C.K. managed to get to his car, and he and K.K. tried to drive away using a spare key. 2-ER-214. Aki chased them with the shovel, hitting the vehicle and shattering its windows; the shards of broken glass cut K.K. 2-ER-214-215, 232. C.K. drove directly to the police station. 2-ER-216. From there, he was transported to the hospital, where he was treated in the emergency room for (1) blunt abdomen trauma, including two fractured ribs, which were the result of "a

deadly force"; and (2) blunt head trauma, including a laceration, an abrasion, and contusions on his head and face, "a massive amount of bleeding," and a concussion with a loss of consciousness. 2-ER-217; 4-ER-548-560; SER-58-86. While still in the emergency room, C.K. told the police that Alo-Kaonohi and Aki assaulted him because "they don't like my skin; I have the wrong color skin." 3-ER-435; GX 50.

B. Procedural Background

1. Pretrial and Trial Proceedings

a. About a week after the assault, Alo-Kaonohi and Aki provided separate voluntary statements to the Maui Police Department. 4-ER-598. Initially, they each denied attacking C.K. or his truck, claiming that any injuries or damage were self-inflicted. SER-93, 97-98, 103. They also each initially denied using a shovel during the assault. SER-87-90, 96, 99-100. Alo-Kaonohi later admitted, however, that he grabbed C.K. by the hair, held him by the balcony, and told him to "pack [his] fucking shit now and get the fuck out of here." SER-90. He further admitted that he ripped C.K.'s gold chain off his neck and that he kicked C.K. in the stomach when he "told [C.K.] to get the fuck down." SER-91-92, 94-95. When police confronted Aki with surveillance video that showed him holding a shovel, he replied that if they had him on video, there was nothing for him to say. 4-ER-612; SER-104-108. When asked why he did not confess, Aki responded that it was "bullshit" because "this wouldn't have happened if the dumb Haoles never cut the

gate. Typical Haole thinking he owning everything, come down with a lot of money, try – try and fucking own everything, try to change everything up in Kahakuloa." SER-109.

State authorities arrested Alo-Kaonohi and Aki on assault and theft charges and re-arrested them a few months later on additional charges. *See* PSR 7; Aki PSR 7. In summer 2019, Aki pleaded no contest to Terroristic Threatening 1, and Alo-Kaonohi pleaded no contest to Assault 1. PSR 7; Aki PSR 7. As part of their plea deals, the state dismissed the other state charges; the state court sentenced each defendant to four years' probation. PSR 7; Aki PSR 7.

b. In January 2021, the United States charged Alo-Kaonohi and Aki with one count of violating 18 U.S.C. 249(a)(1). 6-ER-993-994. Specifically, the indictment alleged that, while aiding and abetting one another, Alo-Kaonohi and Aki "willfully caused bodily injury to C.K., and attempted to cause bodily injury to C.K. through the use of a dangerous weapon (a shovel), because of C.K.'s actual and perceived race and color." 6-ER-994.

Alo-Kaonohi, joined by Aki, moved to dismiss the indictment, arguing that Section 249(a)(1) was unconstitutional. Aki-ER-127, 129. First, to preserve the issue for further review, defendants raised a facial constitutional challenge under the Thirteenth Amendment. Aki-ER-132-134. Second, they argued that Section 249(a)(1) was unconstitutional as applied to their conduct because "using the

epithet 'haole' does not . . . suffice to establish that the decision to assault someone was made because of race." Aki-ER-137. The district court denied the motion, explaining that it was premature for the court to "judge the sufficiency of the evidence." 1-ER-35, 41.

c. The case proceeded to a five-day trial. At the close of the government's case, and again at the end of trial, Alo-Kaonohi and Aki each moved for a judgment of acquittal. 1-ER-27-28; 5-ER-746. Alo-Kaonohi contended that the "argument on the video is clearly about the locks, cutting the locks, the easement, the road, et cetera." 1-ER-27. He also asserted that "the evidence of the video as well as [C.K.'s] very suspect testimony" was insufficient to support a conviction for a hate crime. 1-ER-27. Aki joined Alo-Kaonohi's motion, and he also argued that his statements could not "be considered racial motive" given that "Native Hawaiians have a legal right to preserve their identity." 1-ER-27-28.

The district court denied the motions. 1-ER-30-31; 5-ER-746. Examining "the totality of the circumstances, including the severity of the beatings," the court concluded that "a rational trier of fact could find that the but-for cause of the beatings was racial and not because of the easement." 1-ER-30-31.

d. During a status conference to discuss closing arguments, the government proposed using two analogies that came from Supreme Court precedent to explain the concept of but-for causation: an analogy to a baseball game and the idiom "the

straw that broke the camel's back." 4-ER-717-718; *see also Burrage v. United States*, 571 U.S. 204, 211-212 (2014). Alo-Kaonohi, joined by Aki, objected to the government's use of the "*Burrage* analogies." 4-ER-732-734, 736. After hearing argument, the court determined that defendants could "make an objection during the course obviously of the closing to preserve it," but that the court's "strong inclination is to permit [the use of the analogies] because I don't think it's inconsistent with the instruction, I think it is consistent with the law." 4-ER-736.

The government invoked the *Burrage* analogies during its closing and rebuttal argument to help illustrate the concept of but-for causation. *See* 5-ER-769, 838. Defendants objected to the use of the analogies, which the court overruled. 5-ER-769, 838.

The jury convicted Alo-Kaonohi and Aki of violating 18 U.S.C. 249(a)(1). 5-ER-861.

2. Sentencing

a. The Probation Office prepared substantially similar PSRs for each defendant.[6] The PSRs summarized the offense conduct, including the assault and that defendants "took CK's cellphone, which CK used to record the start of the confrontation." PSR 6. The PSRs also noted that Alo-Kaonohi acknowledged that

[6] For this reason, we cite only to the PSR for Alo-Kaonohi, except where otherwise indicated.

"he and Aki later disposed of the phone." PSR 7. Nevertheless, each PSR stated that the Probation Office had "no information indicating the defendant impeded or obstructed justice." PSR 9. Accordingly, the PSRs did not recommend any sentencing enhancement for obstruction of justice. PSR 10.

The PSRs calculated a base offense level of 14 under Sentencing Guidelines § 2H1.1, which instructs a sentencing court to apply Section 2A2.2 because defendants committed an aggravated assault. PSR 10. The PSRs then added a four-level increase under Sentencing Guidelines § 2A2.2(b)(2)(B) because defendants used a dangerous weapon, and a five-level increase under Sentencing Guidelines § 2A2.2(b)(3)(B) because C.K. sustained a serious bodily injury. PSR 10. The PSRs also added a three-level increase under Sentencing Guidelines § 3A1.1(a) (the "hate-crime enhancement") because the jury found defendants guilty of committing a hate crime, for a total base offense level of 26. PSR 10.

b. The government objected to the PSRs, arguing that the trial evidence supported a finding that defendants willfully destroyed or concealed material evidence—C.K.'s cellphone—with the intent to obstruct a contemplated investigation. *See* PSR 22-23. The Probation Office disagreed, reasoning that "defendants discarded the cellphone prior to the initiation of the investigation." PSR 23. Because "investigators did not recover the cellphone," the Probation Office stated that "there is no way to tell if the phone, in fact, recorded all of the

assault, that the audio was intact, and that it contained material evidence to the case." PSR 23.

Alo-Kaonohi (joined by Aki at the sentencing hearing) objected to the three-level hate-crime enhancement. *See* PSR 24; Aki PSR 22; 5-ER-915-919. Sentencing Guidelines § 3A1.1(a) applies when the jury (or a judge at sentencing following a plea of guilty) finds beyond a reasonable doubt that the defendant intentionally selected his victim because of race. Alo-Kaonohi argued that the trial record did not support a finding that defendants intentionally targeted C.K. because of his race. *See* PSR 24. The Probation Office also rejected this objection and maintained the three-level upward adjustment under Section 3A1.1(a). PSR 25.

c. The district court held separate sentencing hearings for each defendant. *See* 5-ER-911; Aki-ER-13. The court, however, invited Aki's counsel to be present at Alo-Kaonohi's hearing because of overlapping legal issues. 5-ER-911. The court told Aki's counsel that he would "hear [her] arguments on those issues when they come up" but would reserve ruling on them until Aki's hearing. 5-ER-912. Aki's counsel agreed with that approach. 5-ER-912-913.

After hearing arguments from the parties, the court applied the two-level obstruction of justice enhancement under Section 3C1.1. 5-ER-944; Aki-ER-18-19. The court made express findings regarding defendants' conduct and determined by a preponderance of the evidence that "both defendants had to have

been acutely aware that they were in a lot of trouble" and that they "intentionally made a decision to get rid of the phone to thwart an investigation into the offense of conviction." 5-ER-942-943. The court further found that "the evidence on the phone would have been highly material." 5-ER-943; *see also* Aki-ER-18-19 (incorporating "what was argued in the last hearing" and applying the obstruction enhancement to Aki's conduct).

The court sustained Alo-Kaonohi and Aki's objection to applying the hate-crime enhancement. *See* 5-ER-925; Aki-ER-14 (incorporating the argument from Alo-Kaonohi's sentencing on the issue and holding that Section 3A1.1(a)'s three-level enhancement did not apply to Aki's conduct). In so doing, the court reasoned that the hate-crime enhancement cannot apply, even when a jury finds beyond a reasonable doubt that the defendant willfully caused injury to another person because of that person's race, unless the jury makes a special additional finding beyond a reasonable doubt that a defendant "intentionally selected" the victim because of race. 5-ER-922-924. "[A]lthough race was a but-for cause" of the assault, the court explained, it could not say that "the jury necessarily found that [C.K.] was intentionally selected because of his race." 5-ER-924.

Although the court declined to apply the hate-crime enhancement, it repeatedly stated during sentencing that, in the court's view, the assault was "racially motivated" and that the assault would not have happened "but for the fact

that [C.K.] was White." 5-ER-968, 973. The court added that if it had the authority to make the intentional-selection finding—rather than the jury—it would have done so because defendants "obviously made a conscious decision to go on to [C.K.'s] property and to do what they did" and because they "targeted [C.K.], at least in part because of race." 5-ER-968-969.

d. The court calculated each defendant's amended base offense level as 25 after declining the three-level hate-crime enhancement and applying the two-level obstruction enhancement. *See* 5-ER-944-945; Aki-ER-19-20. Given defendants' criminal history categories, this resulted in a Guidelines range of 70 to 87 months' imprisonment for Alo-Kaonohi (*see* 5-ER-945), and 57 to 71 months' imprisonment for Aki (*see* Aki-ER-19-20). The court sentenced Alo-Kaonohi to 78 months' imprisonment and Aki to 50 months' imprisonment. 1-ER-2-8 (Alo-Kaonohi Judgment); SER-16-22 (Aki Judgment). The court imposed a 50-month sentence for Aki to account for the seven months he spent in state custody that would not otherwise have been credited had the court simply sentenced him at the bottom of his guidelines range. 5-ER-919-921, 933-934.

SUMMARY OF ARGUMENT

This Court should affirm defendants' convictions, vacate defendants' sentences, and remand the case to the district court for resentencing.

1. This Court should reject defendants' assertion that Section 249(a)(1) incorporates a heightened causation standard that exceeds but-for causation. Because defendants did not object to the district court's jury instructions, which applied the settled definition of but-for causation, this Court reviews only for plain error. The district court did not err, let alone plainly err, where no court has ever adopted defendants' proffered causation standard.

Nor did the government err in arguing that a "tiny, tiny factor" can be a but-for cause if it is the straw that breaks the camel's back—the very analogy the Supreme Court used to describe but-for causation in *Burrage*. As the Supreme Court and defendants themselves recognize, that idiom fairly describes the concept of but-for causation. Moreover, even assuming that invoking the idiom was error (and it was not), any error would be harmless. The bulk of the government's closing argument and the court's instructions did not repeat the challenged phrase, and overwhelming evidence showed that defendants attacked C.K. because of his race.

2. Section 249(a)(1) is constitutional as applied to defendants' willful, racially motivated assault on C.K. Congress enacted Section 249(a)(1) under its

broad Thirteenth Amendment authority. The Supreme Court has consistently held that the Thirteenth Amendment does not single out for protection only races previously subject to slavery; it authorizes Congress to legislate with respect to every race. Section 249(a)(1) likewise does not limit its reach to only certain races. It explicitly protects "any person" who is targeted because of their race. Here, the jury found that defendants willfully assaulted C.K. because he is white. Neither Section 249(a)(1) nor the Constitution requires anything more.

Defendants' federalism challenge also fails. Congress enacted the Shepard-Byrd Act to enable the United States to work together with state and local law enforcement to investigate and prosecute hate crimes. Rather than afford Congress a general police power, the Act provides that the United States may prosecute someone for racially motivated violence only under certain limited conditions, none of which weaken state authority. The Act thus supports rather than offends principles of federalism.

3. To preserve the issue for further review, defendants also raise a facial constitutional challenge to Section 249(a)(1). As defendants recognize, however, binding circuit precedent mandates that this Court reject defendants' challenge. *See United States v. Hougen*, 76 F.4th 805, 814 (9th Cir. 2023), *petition for cert. pending*, No. 23-6665 (filed Feb. 1, 2024).

4. Aki alone challenges the district court's application of a sentencing enhancement for obstruction of justice. Yet the district court did not clearly err in finding that (1) defendants took and disposed of C.K.'s cellphone, which C.K. used to record portions of the bias-motivated assault, and (2) defendants' actions were purposefully calculated to thwart a contemplated investigation into that assault. The court's findings amply supported application of a two-level enhancement under Sentencing Guidelines § 3C1.1. None of the authorities Aki cites counsels otherwise.

5. The Government's Cross-Appeal. The district court committed procedural error in failing to impose for both defendants a three-level hate-crime enhancement under Sentencing Guidelines § 3A1.1(a). The commentary to Section 3A1.1 makes clear that the enhancement "applies to offenses that are hate crimes." And this Court's precedent—which has upheld application of the enhancement where a jury finds beyond a reasonable doubt that the defendant attacked his victim because of race, without requiring a jury finding that the defendant selected the victim because of their race—comports with that straightforward mandate. Because the district court incorrectly calculated defendants' total offense level, and because the court suggested that it would have applied the enhancement if it believed it had the authority to do so, this Court should remand the case for resentencing.

ARGUMENT

I. Section 249(a)(1)'s "because of" test incorporates the traditional standard of but-for causation.

Defendants argue that Section 249 requires "willful but-for causation," which they suggest is "something more than is ordinarily required to establish non-willful but-for causation." Br. 27; *see also* Aki Br. 20. Apart from being wrong, defendants did not—and still do not—object to the district court's jury instructions, even though the instructions did not include their proposed heightened causation standard, which they propose for the first time on appeal. *See* Br. 36; Aki Br. 41 (joining Alo-Kaonohi's brief); 4-ER-695-698 (final charge conference); 5-ER-757-760 (final instructions); 5-ER-765-766 (same).

"When a defendant does not object to jury instructions at trial, as here, [this Court] review[s] those instructions for plain error." *United States v. Sanders*, 421 F.3d 1044, 1050 (9th Cir. 2005). Defendants have the burden to show "(1) error, (2) that is plain, and (3) that affects substantial rights" to be eligible for relief. *United States v. Hougen*, 76 F.4th 805, 810 (9th Cir. 2023) (citation and internal quotation marks omitted), *petition for cert. pending*, No. 23-6665 (filed Feb. 1, 2024). "Under the fourth prong of plain error review," this Court may grant relief "only if [defendants] can demonstrate that the error 'seriously affects the fairness, integrity, or public reputation of judicial proceedings.'" *Id.* at 810-811 (citation omitted). "[R]elief under plain error review is to be used sparingly, solely in those

circumstances in which a miscarriage of justice would otherwise result." *Id.* at 810 (citation, emphasis, and internal quotation marks omitted). Defendants cannot meet this demanding standard.

A. The district court did not plainly err in instructing the jury on the traditional but-for causation standard.

1. There was no error, let alone plain error, in the district court's instructions. Consistent with the statutory text, the court instructed the jury that to find a defendant guilty of violating Section 249(a)(1), the government must prove two elements:

> **First**: That the defendant willfully caused bodily injury to C.K.,
>
> *or*
>
> That the defendant willfully attempted to cause bodily injury to C.K. through the use of a dangerous weapon; and
>
> **Second**: That the defendant acted because of the actual or perceived race or color of C.K.

SER-43.

The court then instructed the jury on the meaning of those two elements. The court first defined "willfully" to mean that "a defendant acted voluntarily and intentionally—not by mistake or accident—and that he acted with the specific intent to do something which the law forbids." SER-44-45. The court explained that the jury had to find either that "a defendant willfully caused bodily injury to

C.K." or that "the defendant willfully attempted to cause bodily injury," but not both. SER-44-45.

The court explained that to prove the second element—that the defendant acted "because of" C.K.'s race or color—the government must prove:

> that the charged attack would not have occurred but for CK's actual or perceived race or color. The government does not need to prove that CK's race or color was the sole or only motive for a defendant's conduct; to the contrary, you may find the defendant guilty even if you find that there was more than one reason why he engaged in the charged conduct. The government must instead prove that actual or perceived race or color played a determinative role in the defendant's decision to assault CK. In other words, you must find that, despite any other reason that the defendant had for the assault, the assault would not have taken place without the effect of CK's actual or perceived race or color.

5-ER-759-760.

2. The court did not err by instructing the jury on the traditional but-for causation standard.[7] Phrases like "because of" generally require but-for causation. *Burrage v. United States*, 571 U.S. 204, 212-213 (2014); *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1739 (2020). But-for causation is "the *minimum* requirement for a finding of causation." *Burrage*, 571 U.S. at 211 (citation omitted). It simply

[7] Indeed, Alo-Kaonohi's proposed jury instructions also comported with the traditional "but-for" causation standard. *See* 6-ER-992. Citing *Burrage v. United States*, 571 U.S. 204 (2014), Alo-Kaonohi proposed to instruct the jury that "more than one reason" may have led to the assault so long as "the defendants were partially . . . motivated by C.K.'s actual or perceived race or color." 6-ER-992 & n.6. Aki did not submit a proposed instruction on this element. *See* SER-54-57.

means "'that the harm would not have occurred' in the absence of" the prohibited factor. *Ibid.* (citation omitted). Thus, even where "the predicate act combines with other factors to produce the result, so long as the other factors alone would not have done so— if, so to speak, it was the straw that broke the camel's back"—then it is a but-for cause. *Ibid.*; *see also EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 772 (2015) (recognizing that "[t]he term 'because of' appears frequently in antidiscrimination laws" and that it "typically imports, at a minimum, the traditional standard of but-for causation").

That Section 249(a)(1) requires a defendant to act "willfully"—*i.e.*, "voluntarily and intentionally" (*see* SER-44-45)—when causing bodily injury does not mean a heightened causation standard applies to the statute. Rather, it is enough that defendant acted intentionally and would not have taken the same action but for the victim's race. *Bostock* is instructive. There, the Court was tasked with interpreting "Title VII's command that it is 'unlawful . . . for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.'" *Bostock*, 140 S. Ct. at 1738 (quoting 42 U.S.C. 2000e-2(a)(1)). Because *Bostock* was a "disparate treatment" case, the Court interpreted "discriminate" to mean that, to be liable, an employer must "intentionally treat[] a person worse because of [a protected

characteristic]." *Id.* at 1740. Thus, although Title VII does not contain the word "willful," the Court in *Bostock* faced an analogous question: whether the traditional but-for causation standard applies where a statute requires the defendant to act intentionally because of a protected characteristic. *Id.* at 1739.

The Supreme Court firmly rejected any suggestion that a heightened causation standard applies where the defendant must act intentionally, holding that "Title VII's 'because of' test incorporates the 'simple' and 'traditional' standard for but-for causation." *Bostock*, 140 S. Ct. at 1739 (quoting *University of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 346, 360 (2013)). The Court explained that "Congress could have taken a more parsimonious approach." *Ibid.* For instance, it "could have added 'solely' to indicate that actions taken 'because of' the confluence of multiple factors do not violate the law." *Ibid.* Or "it could have written 'primarily because of' to indicate that the prohibited factor had to be the main cause of the defendant's challenged employment decision." *Ibid.* But, interpreting the statute's plain text, the Court found no indication that Congress envisioned a heightened standard to apply. *Ibid.*

The same is true here. This Court likewise should hold that the term "willfully" does not indicate that Congress intended a heightened causation standard to apply before liability can attach under Section 249(a)(1). As with Title VII, Section 249(a)(1) does not "use[] terms like 'solely' and 'primarily' to modify

'because of.'" *See Thomas v. CalPortland Co.*, 993 F.3d 1204, 1209 (9th Cir. 2021) (quoting *Bostock*, 140 S. Ct. at 1739). As this Court has stated, "absent such modifiers, . . . 'because of' means 'but for.'" *Ibid.* Nor does "willfully" modify "because of," as defendants suggest. *Cf.* Br. 28-29; Aki Br. 20-22. A defendant's willfulness under Section 249(a)(1) goes to his intentional act of causing bodily injury to the victim because of the victim's race. This Court should not read "willfully" as also modifying "because of," which is grammatically non-sensical and redundant. Because Congress did not limit Section 249(a)(1)'s reach to actions taken "primarily" or "solely" because of the victim's race, the traditional but-for causation standard should apply.

3. Even assuming for purposes of defendants' argument that a more demanding causation showing applies because the statute elsewhere uses the term "willfully," any error was not plain. To be plain, an error must be "clear" or "obvious" under current law. *United States v. De La Fuente*, 353 F.3d 766, 769 (9th Cir. 2003) (citing *United States v. Olano*, 507 U.S. 725, 734 (1993)). "An error cannot be plain where there is no controlling authority on point and where the most closely analogous precedent leads to conflicting results." *Ibid.* (citation omitted). The case law that exists dooms defendants' argument.

No court has ever held that Section 249(a)(1)'s use of "willfully" in one part of the statute means that its later use of "because of" requires something other than

traditional but-for causation. Rather, consistent with the statute's text, courts have routinely held that Section 249(a)(1) requires the government to prove only that the defendant acted "because of" a protected characteristic, meaning that the defendant would not have intentionally caused the victim injury but for that protected characteristic. *See, e.g.*, *United States v. Hatch*, 722 F.3d 1193, 1206 (10th Cir. 2013) (holding that Section 249(a)(1) "seeks to punish only those who act '*because of* the [victim's] actual or perceived race'" (quoting 18 U.S.C. 249(a)(1)); *United States v. Metcalf*, No. 15-CR-1032-LRR, 2016 WL 1599485, at *3 (N.D. Iowa Apr. 20, 2016) (holding that the "because of" element of Section 249(a)(1) "requires proof that the victim's actual or perceived race was the but-for cause of the defendant's willful assault of the victim"), *aff'd*, 881 F.3d 641 (8th Cir. 2018); *see also United States v. Miller*, 767 F.3d 585, 592 (6th Cir. 2014) (holding that a defendant violates 18 U.S.C. 249(a)(2)(A) "when the person's actual or perceived religion was the reason the defendant decided to act—that is, the straw that broke the camel's back" (internal quotation marks and citations omitted)). Given that no court has adopted defendants' proposed heightened standard, the district court did not plainly err in instructing the jury. *See, e.g.*, *De La Fuente*, 353 F.3d at 769.

4. Because the plain text of Section 249(a)(1) clearly incorporates the traditional but-for causation standard, this Court need not reach either of the

additional doctrines of statutory interpretation that defendants invoke. *See* Br. 34-36; Aki Br. 23-24. In any event, neither advances their argument.

First, the rule of lenity does not support defendants' narrow interpretation of the statute because there is no uncertainty in Section 249(a)(1)'s reach. *See* Aki Br. 23 (quoting *United States v. Kozminski*, 487 U.S. 931, 952 (1988)). When a court interprets a criminal statute subject to the rule of lenity, it "cannot give the text a meaning that is different from its ordinary, accepted meaning, and that disfavors the defendant." *Burrage*, 571 U.S. at 216. While Congress could have written Section 249(a)(1) to impose a heightened standard, "[i]t chose instead to use language that imports but-for causality." *Ibid.* Given the well-established meaning of "because of," the rule of lenity has no application here.

Nor does the canon of constitutional avoidance require this Court to adopt defendants' interpretation. *See* Br. 34-35; Aki Br. 23. First, as just explained, the text of Section 249(a)(1) unambiguously requires this Court to apply the traditional but-for causation standard. Second, as discussed later, *see* pp. 42-47, *infra*, applying traditional but-for causation does not raise federalism concerns or other "serious constitutional questions." *Cf.* Br. 34.

In sum, the court did not plainly err in instructing the jury that simple but-for causation applies to Section 249(a)(1)'s prohibition on willfully causing bodily injury to a person because of that person's race.

B. Defendants' challenge to the government's closing argument fails.

Defendants also argue (Br. 27, 32; Aki Br. 19-20) that various statements in the government's closing argument were improper under their proffered standard. Specifically, defendants object to the government's statement that a "tiny, tiny factor" can be a but-for cause if it is the straw that breaks the camel's back. Again, there is no basis to disturb the verdict.

1. During closing argument and in rebuttal, counsel for the government explained the but-for causation standard:

> For something to be a but-for cause, it has to be . . . one of the necessary reasons that something happened. Doesn't have to be the most important reason. It could be a really tiny reason. But as long as it's a necessary reason for the outcome, it's a but-for cause. And to illustrate that, think of the old saying "the straw that broke the camel's back."

5-ER-838. The government then "unpack[ed]" the meaning of that idiom:

> Camels can carry about 1,000 pounds on their backs. It's a lot. Imagine a camel that can hold exactly 1,000 pounds and no more. And then imagine you loaded a thousand pound weight on that camel's back. He still stands up because he can carry exactly 1,000 pounds and no more. Now take a little piece of straw weighing almost nothing and put it on top. That camel will collapse. That is the straw that broke the camel's back.
>
> Now, . . . what's the but-for cause of that? That's a trick question. It's not just one but-for cause. That thousand pound weight, that's the most important reason, right? Without that weight, if it's just the straw, camel is going to stay up. So you take that away, that's how you know it's a but-for cause.
>
> But the same thing with the straw. Even though it's a tiny, tiny factor, when it was just that thousand pound weight on the camel, the camel

> stayed standing. So that little tiny piece of straw, that's a but-for cause as well.

5-ER-839.

The government clarified that it was "talking about camels and straws" "to make the point that under the legal standard [the jury was] instructed to consider, race just has to be one of the necessary reasons for the outcome, but it doesn't have to be the most important reason or the biggest reason." 5-ER-839. While the government argued that the jury could find "from the evidence in this case that race was at the core of what this [assault] was about," it maintained that even if there were "about 17 other things" that contributed to the assault, "if race played a role in the outcome, a necessary role, then it's a but-for cause." 5-ER-840.

2. Contrary to defendants' arguments (Br. 27; Aki Br. 20), the government's use of the "straw-that-broke-the camel's back" idiom was appropriate and does not require a new trial. As defendants admit, the idiom fairly describes the concept of but-for causation. *See* Br. 27; Aki Br. 20.[8] Because Section 249(a)(1) does not require a heightened causation standard, the government did not err in using this

[8] In fact, although defendants objected to the government's use of the idiom during closing, they themselves have used the idiom to describe the but-for causation standard. *See* Aki-ER-130-131 (Alo-Kaonohi's Mot. to Dismiss) (citing *Metcalf*, 2016 WL 1599485, at *3, for the proposition that a "but-for cause" is "the straw that broke the camel's back"); SER-130 (same); *see also* Aki-ER-127 (joining Alo-Kaonohi's motion to dismiss).

idiom to explain the standard. *See Burrage*, 571 U.S. at 211 (using the "straw that broke the camel's back" idiom to explain but-for causation); *Miller*, 767 F.3d at 592 (same).

Nor did the government misstate the law (5-ER-838) when it argued that a "tiny reason" can be a "but-for cause" if it is "a necessary reason for the outcome." As this Court has recognized, "[b]ut-for causation is a relatively undemanding standard: a but-for cause of a harm can be anything without which the harm would not have happened." *United States v. George*, 949 F.3d 1181, 1187 (9th Cir. 2020); *see also General Refractories Co. v. First State Ins. Co.*, 855 F.3d 152, 161 (3d Cir. 2017) ("'But for' causation is a de minimis standard of causation, under which even the most remote and insignificant force may be considered the cause of an occurrence." (internal citation and quotation marks omitted)); *Matthews v. Ernst Russ S.S. Co.*, 603 F.2d 676, 681 (7th Cir. 1979) (holding that an instruction on but-for causation that "permitted the jury to hold defendants liable if their act or omission played any part, no matter how small, or contributed in any way in causing plaintiff his injury" was "a correct statement of the law"). The government's closing argument comports with this precedent.

3. Even if any part of the government's argument was improper (and it was not), any error was harmless. "When the defendant objects to alleged prosecutorial misconduct, the standard of review is abuse of discretion." *United States v.*

Nobari, 574 F.3d 1065, 1073 (9th Cir. 2009) (quoting *United States v. Steele*, 298 F.3d 906, 910 (9th Cir. 2002)). When a defendant establishes that prosecutorial misconduct has occurred, this Court applies harmless error review. *United States v. Del Toro-Barboza*, 673 F.3d 1136, 1150 (9th Cir. 2012); *Nobari*, 574 F.3d at 1073. Under harmless error review, "[a] claim of prosecutorial misconduct is viewed in the entire context of the trial, and '[r]eversal on this basis is justified only if it appears more probable than not that prosecutorial misconduct materially affected the fairness of the trial.'" *United States v. Younger*, 398 F.3d 1179, 1190 (9th Cir. 2005) (second alteration in original) (quoting *United States v. Toomey*, 764 F.2d 678, 681 (9th Cir. 1985)).

First, any error should be considered harmless when viewed in context. "The jury is regularly presumed to accept the law as stated by the court, not as stated by counsel." *United States v. Medina Casteneda*, 511 F.3d 1246, 1250 (9th Cir. 2008) (internal quotation marks omitted). Here, there is no dispute that the court properly instructed the jury. *See* Br. 36. And the court reminded the jury more than once that (1) the court's instructions, rather than the attorney's arguments about the law, governed the jury's deliberations, and (2) the arguments of counsel were not evidence. *See* 2-ER-65; 5-ER-855.

Second, the defendants do not dispute that the government correctly stated the law before and after the challenged statements when the government told the

jury that race had to play a determinative role for it to satisfy the but-for standard. *See, e.g.*, 5-ER-838, 840. Nor can defendants reasonably dispute that the evidence of defendants' racial motivation was overwhelming. *See, e.g.*, 2-ER-202 (C.K.'s testimony regarding defendants' statements during the assault); 5-ER-968-969, 973 (district court's statements that the assault was racially motivated). Thus, even assuming the government mischaracterized the standard during closing argument, the defendants were not prejudiced. *See Medina Casteneda*, 511 F.3d at 1250 (where prosecutor correctly stated the law a couple of sentences before misstating the law, and the court properly instructed the jury, misstatement was harmless); *Sims v. Brown*, 425 F.3d 560, 571 (9th Cir.), *amended by*, 430 F.3d 1220 (9th Cir. 2005) (finding no prejudice where evidence of guilt was overwhelming); *Beardslee v. Woodford*, 358 F.3d 560, 584-585 (9th Cir. 2004) (where "bulk of [prosecutor's] closing argument" and court's instructions accurately stated law, prosecutor's statements that "pushed the boundaries of permissible argument" were harmless).

4. Finally, defendants argue that absent "a strong scienter requirement as to racial bias," there is a risk that "overzealous prosecutors will over-federalize local assault and battery offenses." Br. 30-31; *see also* Aki Br. 21-22. But that argument overlooks that the statute requires proof beyond a reasonable doubt that race was an outcome-determinative factor in an assault, *i.e.*, a finding that the defendant would not have caused the victim bodily injury but for the victim's race.

See 1-ER-43. Thus, defendants are wrong (Br. 31) that the but-for causation standard would transform "almost *any* interracial or multiracial assault" into a federal hate crime. *See United States v. Diggins*, 36 F.4th 302, 311 (1st Cir.), *cert. denied*, 143 S. Ct. 383 (2022) (holding that Section 249(a)(1) "employs a conservative framework" and "the phantasm of overzealous enforcement does not haunt the provision at issue").

Moreover, defendants lack standing to litigate the putative rights of other individuals who they suggest may be prosecuted based on unconscious biases. Outside the First Amendment context, "a plaintiff can only succeed in a facial challenge by 'establish[ing] that no set of circumstances exists under which the Act would be valid,' *i.e.*, that the law is unconstitutional in all of its applications." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). Nor can a court, absent certain exceptions not applicable here, entertain a constitutional challenge to a statute unless it is unconstitutional as applied to the challenger. *See United States v. Raines*, 362 U.S. 17, 22 (1960); *see also Griffin v. Breckenridge*, 403 U.S. 88, 104 (1971).

Finally, the government never suggested to the jury that defendants willfully assaulted C.K. because of unconscious bias. To the contrary, the government

repeatedly argued that defendants explicitly stated their conscious bias against C.K. For instance, during its closing argument, the government argued that

> [t]he defendants made very clear what this was about. You don't belong here. Your skin is the wrong fucking color. No White man is ever going to live in this village. They weren't subtle about why they did it. And you don't need a linguistics degree to figure out that this was a hate crime. The evidence is clear these defendants are guilty.

5-ER-850-851. Thus, this Court need not, and should not, consider defendants' arguments about unconscious bias.

* * * * *

In sum, the district court did not err, let alone plainly err, in instructing the jury on the traditional but-for causation standard. Nor did the government err in stating that a "tiny, tiny factor" can constitute a but-for cause of a defendant's actions so long as the defendant would not have acted similarly without that factor. And even assuming the government mischaracterized that standard, those remarks were harmless given the court's indisputably proper instructions, considering the entirety of the government's closing argument, and in light of the overwhelming evidence that defendants attacked C.K. because of his race.

II. Section 249(a)(1) is constitutional as applied to defendants' conduct and does not raise federalism concerns.

Congress passed the Shepard-Byrd Act under its broad Thirteenth Amendment power to pass all laws necessary and proper for abolishing all badges and incidents of slavery. *See United States v. Hougen*, 76 F.4th 805, 814 (9th Cir.

2023) (citing *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968)), *petition for cert. pending*, No. 23-6665 (filed Feb. 1, 2024). *Jones* sets forth a deferential test that asks only "whether Congress could rationally have determined that the acts of violence covered by [the law] impose a badge or incident of servitude on their victims." *Ibid.* (alteration in original) (quoting *United States v. Allen*, 341 F.3d 870, 884 (9th Cir. 2003)).

Defendants argue that Section 249(a)(1) is unconstitutional as applied to their conduct for two reasons. First, they ask this Court to hold that Section 249(a)(1) cannot be constitutionally applied "to protect someone of the oppressing demographic," *i.e.*, "the white citizenry." Br. 44-45; *see also* Aki Br. 36-40. Second, defendants argue that "Section 249(a)(1) is unconstitutional on federalism grounds if its hatred hook picks up every local assault that is, however slightly, tinged by just a 'tiny, tiny' bit of racial bias." Br. 41; *see also* Aki Br. 30 (similar). Defendants are wrong on both counts.

A. Section 249(a)(1) is a constitutional exercise of Congress's Thirteenth Amendment enforcement authority as applied in this case.

Defendants argue that Section 249(a)(1) cannot be constitutionally applied to their conduct because Congress's broad Thirteenth Amendment authority "is not capacious enough to embrace a generally-applicable federal hate crime law." Br. 43. Specifically, they assert (Br. 44) that "[d]epriving a white citizen of something

simply is not a badge or incident of slavery or involuntary servitude." This Court should reject defendants' argument.

1. The Thirteenth Amendment "is not a mere prohibition of state laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States." *Jones*, 392 U.S. at 438 (citation omitted). For more than a century the Supreme Court has recognized that "[w]hile the [Thirteenth Amendment's] immediate concern was with African slavery, the Amendment was not limited to that." *Bailey v. Alabama*, 219 U.S. 219, 240-241 (1911).

Thus, courts have repeatedly recognized that "the Thirteenth Amendment protects all races, not just those that had been subject to slavery in the United States." *United States v. Hatch*, 722 F.3d 1193, 1208 (10th Cir. 2013). As the Second Circuit has explained, "[a]lthough the Thirteenth Amendment, which was ratified in 1865, was enacted in the historical context of American slavery, which applied almost exclusively to African Americans, the interpretation of the Amendment itself has not been so limited." *United States v. Nelson*, 277 F.3d 164, 176 (2d Cir. 2002). Rather than singling out certain groups for protection, the Thirteenth Amendment is "a charter of universal civil freedom for all persons, of whatever race, color, or estate, under the flag." *Bailey*, 219 U.S. at 241; *see also Hodges v. United States*, 203 U.S. 1, 17 (1906) (recognizing that the Thirteenth

Amendment "reaches every race and every individual"), *overruled on other grounds by Jones*, 392 U.S. 409; *Civil Rights Cases*, 109 U.S. 3, 33 (1883) (Harlan, J., dissenting) ("The terms of the thirteenth amendment are absolute and universal. They embrace every race which then was, or might thereafter be, within the United States."). Simply put, the Thirteenth Amendment authorizes Congress "to legislate in regard to every race and individual." *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 288 n. 18 (1976) (internal quotation marks omitted).

2. Section 2 of the Thirteenth Amendment grants Congress the power to do "much more" than abolish slavery; it authorizes Congress to enact "all laws necessary and proper for abolishing all badges and incidents of slavery." *Jones*, 392 U.S. at 439 (emphasis and citation omitted). Pursuant to that authority, Congress enacted Section 249(a)(1) to prohibit "willfully caus[ing] bodily injury to *any person* . . . because of the actual or perceived race, color, religion, or national origin of any person." 18 U.S.C. 249(a)(1) (emphasis added). In enacting Section 249(a)(1), Congress expressly found that slavery was "defined" by race and that it was enforced through "widespread public and private violence directed at persons because of their race." 34 U.S.C. 30501(7). Eradicating violence against all groups classified as races at the time of the Thirteenth Amendment's ratification falls squarely within Congress's authority to eradicate the vestiges of this race-based institution.

Given the longstanding links between slavery and racial violence, this Court, in *Hougen*, recently upheld Section 249(a)(1)'s constitutionality under the Thirteenth Amendment, both facially and as applied in that case. In so doing, this Court reaffirmed as "well established" the rationality of Congress's conclusion "that violence (or attempted violence) perpetrated against victims on account of the victims' race is a badge or incident of slavery." *Hougen*, 76 F.4th at 814. The Court upheld Section 249(a)(1) as applied because the statute "squarely prohibit[s]" racial violence. *Id.* at 815; *see also Hatch*, 722 F.3d at 1206 ("Just as master-on-slave violence was intended to enforce the social and racial superiority of the attacker and the relative powerlessness of the victim, Congress could conceive that modern racially motivated violence communicates to the victim that he or she must remain in a subservient position, unworthy of the decency afforded to other races.").

3. Consistent with this precedent, courts that have addressed as-applied challenges to Section 249(a)(1) like the one defendants raise here have rejected the argument that "racially motivated hate crimes against white victims" cannot be "characterized as a badge of slavery." *United States v. Beebe*, 807 F. Supp. 2d 1045, 1055 (D.N.M. 2011), *aff'd sub nom. Hatch*, 722 F.3d 1193; *see also, e.g.*, *Wisconsin v. Mitchell*, 508 U.S. 476, 480, 490 (1993) (upholding the application of a hate-crime penalty against a Black defendant who intentionally selected a white

victim because of his race); *United States v. Bowers*, 495 F. Supp. 3d 362, 370 n.7 (W.D. Pa. 2020) (rejecting "the proposition that a victim must be a member of a class that suffered enslavement prior to the passage of the 13th Amendment for § 249(a)(1) to be constitutionally applied").

This Court should likewise reject defendants' as-applied challenge on these grounds. Section 249(a)(1) squarely proscribes defendants' conduct here—assaulting C.K. because of his race. That defendants are Native Hawaiian and C.K. is white does not demand a different result. Congress expressly invoked its Thirteenth Amendment enforcement authority when enacting Section 249(a)(1), and there can be no serious dispute that it exercised the full extent of that authority and intended to protect all racial groups. *See Hatch*, 722 F.3d at 1209 (explaining that Section 249(a)(1) "does not limit its reach to members of formerly enslaved races, but explicitly protects 'any person.'" (quoting 18 U.S.C. 249(a)(1))).

4. Moreover, to limit Section 249(a)(1)'s reach to only certain races would risk violating equal protection principles. *Cf. Hatch*, 722 F.3d at 1208-1209 (rejecting argument that Section 249(a)(1) raises an equal protection problem because it "explicitly protects 'any person'" (quoting 18 U.S.C. 249(a)(1)); *see also United States v. Jenkins*, 909 F. Supp. 2d 758, 775 (E.D. Ky. 2012) (holding that 18 U.S.C. 249(a)(2) does not raise equal protection concerns because it "provides neutral protection for all people"). This Court should read Section

249(a)(1) in accordance with its plain language, which prohibits all willful, race-based assaults causing bodily injury.

B. Defendants incorrectly assert that Section 249(a)(1) is unconstitutional on federalism grounds.

Defendants also argue that Section 249(a)(1) is unconstitutional on federalism grounds as applied to their conduct because their assault was only "slightly, tinged by just a 'tiny, tiny' bit of racial bias." Br. 41; *see also* Aki Br. 30 (similar). Not so.

1. In enacting the Shepard-Byrd Act, "Congress made extensive findings about the need for federal assistance to combat the pervasive problem of racially motivated violence." *United States v. Diggins*, 36 F.4th 302, 314 (1st Cir.), *cert. denied*, 143 S. Ct. 383 (2022). As relevant here, Congress found that "[t]he incidence of violence motivated by the [victim's] actual or perceived race . . . poses a serious national problem." 34 U.S.C. 30501(1).

Congress recognized that, "[a]s with most criminal activity, violent hate crimes can properly be investigated and prosecuted at both the Federal and State/local level, depending on the facts of the case and the needs of the investigation." H.R. Rep. No. 86, 111th Cong., 1st Sess. 5 (2009). Congress thus enacted the Shepard-Byrd Act to "provide[] the Federal Government the tools to effectively pursue the significant Federal interest in eradicating bias-motivated violence—both by assisting States and local law enforcement, and by pursuing

Federal charges where appropriate." *Id.* at 6. Congress believed that, in limited circumstances, providing concurrent federal jurisdiction over hate crimes was important to create a "'backstop' to State and local efforts." *Ibid.*

Aware of federalism concerns, Congress required that the Attorney General or a designee certify that certain conditions exist before a case may be federally prosecuted. 18 U.S.C. 249(b)(1). The purpose of the certification requirement is "to ensure that the Federal Government will assert its new hate crimes jurisdiction only in a principled and properly limited fashion." H.R. Rep. No. 86, 111th Cong., 1st Sess. 14 (2009). Consequently, before the federal government may prosecute someone for violating the Shepard-Byrd Act, the Attorney General or a designee must certify that one of four conditions exist: (1) the State lacks jurisdiction; (2) the State requested the federal government to assume jurisdiction; (3) the verdict or sentence obtained under state charges left a federal interest unvindicated; or (4) a federal prosecution is in the public interest and necessary to secure substantial justice. 18 U.S.C. 249(b)(1)(A)-(D).

"[N]one of the cases in which Congress authorized prosecutions under § 249(a)(1) weaken state authority in any way." *Diggins*, 36 F.4th at 316-317. Rather, Section 249(a)(1) is "a cornerstone of a scheme of cooperative federalism, representing an ordinary example of one of many parallel state and federal penal laws." *Id.* at 316. Congress asserted federal jurisdiction to enable the Department

of Justice to "work together as partners" with state and local law enforcement in the investigation and prosecution of hate crimes. 34 U.S.C. 30501(9). Congress cannot be said "to have arrogated to itself a general police power when it targets only racially motivated violence through cooperation with the states." *Diggins*, 36 F.4th at 317 (citing *Hatch*, 722 F.3d at 1203-1204). Section 249(a)(1) thus "supports rather than offends principles of federalism." *Ibid.*

2. Defendants contend that it would violate principles of federalism if the federal government could prosecute hate crimes based on a small amount of racial animus because it "would infringe on the States' traditional police powers over assaults." Br. 38; *see also* Aki Br. 29. But, as already discussed, Section 249(a)(1)'s provision of concurrent federal jurisdiction does not usurp the states' power to prosecute these crimes. Rather, "[f]ederal laws criminalizing conduct within traditional areas of state law, whether the states criminalize the same conduct or decline to criminalize it, are of course commonplace under the dual-sovereign concept and involve no infringement per se of states' sovereignty in the administration of their criminal laws." *United States v. Johnson*, 114 F.3d 476, 481 (4th Cir. 1997).

Nor does Section 249(a)(1) "risk conferring Congress general police powers." Aki Br. 29; *see also* Br. 38. Analyzing a separate hate crime statute that prohibits willfully interfering with federally protected rights, the Second Circuit

rejected the argument that that statute "attempts to create a general, undifferentiated federal law of criminal assault." *Nelson*, 277 F.3d at 185 (discussing 18 U.S.C. 245(b)(2)(B)). The court concluded that the "constitutional shoals that would lie in the path of interpreting" Section 245 as a general federal law of criminal assault could be avoided by requiring that victims be harmed *because of* their race and *because of* their use of a public facility. *Id.* at 185-186 (quoting 18 U.S.C. 245(b)(2)(B)); *see also Allen*, 341 F.3d at 884 (agreeing with the Second Circuit's "well-reasoned opinion[]").

Section 249(a)(1)'s requirement that "the victim be harmed *because of* his or her race or religion," *see* 18 U.S.C. 249(a)(1) (emphasis added), likewise suffices to bring that Act within the scope of Congress's Thirteenth Amendment power to abolish all badges and incidents of slavery, *see Hougen*, 76 F.4th at 816 (holding that Section 249(a)(1) is a valid exercise of Congress's enforcement authority under the Thirteenth Amendment); *see also United States v. Diggins*, 435 F. Supp. 3d 268, 274 (D. Me. 2019) (rejecting argument that Section 249(a)(1) "effectively grant[s] Congress a plenary police power") (internal citation and quotation marks omitted)), *aff'd*, 36 F.4th 302 (1st Cir. 2022).

In sum, "Section 249(a)(1) is a constitutional exercise of Congress's enforcement authority under Section Two of the Thirteenth Amendment."

Hougen, 76 F.4th at 816. It therefore neither affords Congress a general police power nor does it improperly infringe on the States' traditional police powers.

3. Finally, defendants err (Br. 38; Aki Br. 29) to the extent they suggest there was anything "small" about the showing of racial animus that the government presented here. Specifically, defendants contend that "Section 249(a)(1) is unconstitutional on federalism grounds if its hatred hooks picks up . . . a single ambiguous Hawaiian word in which a federal prosecutor's ear hears a racial slur." Br. 41. But despite questioning the evidence of racial bias, defendants are not raising a sufficiency argument. Nor could they.

Although the jury could certainly consider defendants' recorded use of the word "haole" in deciding whether defendants acted because of race, the jury could also consider C.K.'s credible testimony that defendants viciously attacked him while telling him "you don't belong here" and that he had "the wrong fucking color skin" and repeatedly calling him a "*Haole* fucker." 2-ER-202. In short, overwhelming evidence supported the jury's finding that defendants acted because of C.K.'s race. *See, e.g.*, *United States v. Cannon*, 750 F.3d 492, 508 (5th Cir. 2014) (affirming Section 249(a)(1) convictions where the victim testified that the defendants used a racial epithet multiple times right before the assault).

Moreover, defendants' argument rests on their incorrect claim (Br. 38-40; Aki Br. 26-27) that the government's closing argument tried to persuade the jury

that the limited, recorded use of the word "haole" to describe C.K. was sufficient to convict. The record easily belies their claim. The government acknowledged that, depending on the context in which it is used, the word "haole" can be an innocuous description or a derogatory racial slur. 5-ER-850. The government expressly told the jury that "this case doesn't hinge on your interpretation of the word *Haole*" and that "you don't need a linguistics degree to figure out that this was a hate crime." 5-ER-850-851. Rather than rely solely, or even primarily, on the word "haole," the government argued that the defendants "said something that in this context has clear racial connotations," which can be heard on the video of the assault eight times—"[y]ou don't belong here"—by which the government argued that defendants meant, "Hey, White guy, you don't belong in this Hawaiian village." 5-ER-836-837. Clearly, the government did not try to persuade the jury that "the recorded use of the word 'haole' was sufficient to transform the state-offense of assault into a federal hate crime." *Cf.* Aki Br. 26.

Because Section 249(a)(1) only targets conduct where race is outcome-determinative, its prohibition easily falls within Congress's Thirteenth Amendment enforcement authority. This Court should reject defendants' federalism challenge.

III. Defendants' facial challenge to Section 249(a)(1) fails.

In addition to their as-applied challenge, defendants further contend that this Court should hold that Section 249(a)(1) is facially unconstitutional for two

reasons. First, citing Judge Ikuta's dissent in *United States v. Hougen*, 76 F.4th 805, 816-827 (9th Cir. 2023), *petition for cert. pending*, No. 23-6665 (filed Feb. 1, 2024), defendants argue that "Congress's authority to enforce the Thirteenth Amendment's slavery ban does not authorize the enactment of a generally-applicable federal hate crime law." Br. 50-51; Aki Br. 40. Second, defendants argue that this Court should revisit the test set forth in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), for whether legislation is a valid exercise of Congress's Thirteenth Amendment authority. Br. 50-52; Aki Br. 40. As both concede, however, precedent forecloses those arguments. Br. 52 (recognizing that *Hougen* and *Jones* are "binding precedent"); Aki Br. 40 (same).

Defendants are correct that the holdings in *Hougen* and *Jones* are controlling. *See Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001) (stating that "a later three-judge panel" must "apply the earlier-adopted rule; it may not any more disregard the earlier panel's opinion than it may disregard a ruling of the Supreme Court" (citation omitted)). Nor is there any reason to revisit this Court's decision in *Hougen*. Every court to consider the question—including five other courts of appeals—has agreed that Section 249(a)(1) is an appropriate exercise of Congress's Thirteenth Amendment power. *See, e.g.*, *United States v. Diggins*, 36 F.4th 302, 309-311 (1st Cir.), *cert. denied*, 143 S. Ct. 383 (2022); *United States v. Roof*, 10 F.4th 314, 392 (4th Cir. 2021), *cert. denied*, 143 S. Ct. 303 (2022); *United*

States v. Cannon, 750 F.3d 492, 500-502 (5th Cir. 2014); *United States v. Metcalf*, 881 F.3d 641, 645 (8th Cir. 2018); *United States v. Hatch*, 722 F.3d 1193, 1205-1206 (10th Cir. 2013).

IV. The district court correctly applied the obstruction-of-justice enhancement when sentencing Aki.

Aki individually contests (Aki Br. 10-18) the application of a two-level sentencing enhancement for obstruction of justice.[9] This Court reviews a district court's "interpretation of the [Sentencing] Guidelines de novo, its factual findings for clear error, and its application of the facts to the law for abuse of discretion." *See United States v. Ehmer*, 87 F.4th 1073, 1136 (9th Cir. 2023). Aki can identify no error in the district court's application of the Guidelines.

[9] Alo-Kaonohi purports to join in Aki's brief in its entirety. *See* Br. 53 (citing Fed. R. App. P. 28(i)). Yet, Aki challenges the Guidelines only as applied to his conduct. *See* Aki Br. 8 (arguing that the court "erred at sentencing by applying a two-point upward adjustment to *Mr. Aki's* sentence" (emphasis added)); *id.* at 18 (arguing that the court erred in "attribut[ing] Mr. Alo-Kaonohi's self-admitted intentional conduct . . . to Mr. Aki without making explicit findings as to Mr. Aki's actual conduct"). Because Aki's sentencing argument "is necessarily defendant-specific; [Alo-Kaonohi's] failure to discuss the issue in his briefs precludes adoption of it." *See United States v. Vgeri*, 51 F.3d 876, 882 n.3 (9th Cir. 1995); *see also United States v. Alix*, 86 F.3d 429, 434 n.2 (5th Cir. 1996) ("[A]n appellant may not raise fact-specific challenges to his own conviction or sentence, such as . . . challenges to the application of the sentencing guidelines, by merely referring to similar challenges in another appellant's brief." (citation omitted)).

A. The district court's findings here amply support application of the obstruction-of-justice enhancement.

Section 3C1.1 of the Sentencing Guidelines permits a two-level enhancement when the defendant "willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice." Sentencing Guidelines § 3C1.1. Where, as here, the obstructive conduct "occurred prior to the start of the investigation of the instant offense of conviction," the enhancement applies "if the conduct was purposefully calculated, and likely, to thwart the investigation or prosecution of the offense of conviction." Sentencing Guidelines § 3C1.1 comment. (n.1). The sentencing judge need find only by a preponderance of the evidence that the defendant obstructed justice. *United States v. Sager*, 227 F.3d 1138, 1146 (9th Cir. 2000).

During Alo-Kaonohi's sentencing hearing, the court found that C.K. "credibly testified" that he "recorded portions of the assault with his cellphone" and that defendants "made racist statements" while he was filming. 5-ER-941. Additionally, the court pointed out that Alo-Kaonohi admitted in a recorded interview with police that defendants took C.K.'s phone and that Aki threw it into the ocean. 5-ER-942. Turning to the elements of the obstruction-of-justice enhancement, the court first found by a preponderance of the evidence that "given the brutal nature of the beating that had just taken place, both defendants had to have been acutely aware that they were in a lot of trouble." 5-ER-942. The court

further found that defendants "both knew there was potentially at least a hate crime motivation behind" the assault. 5-ER-942. The court concluded that defendants "intentionally made a decision to get rid of the phone to thwart an investigation into the offense of conviction." 5-ER-943. Second, the court found that the phone "likely had critical evidence on it based on what [C.K.] said and, again, based on what Mr. Alo-Kaonohi said about [C.K.] recording." 5-ER-943.

During Aki's sentencing hearing, the court incorporated the arguments from and its statements during Alo-Kaonohi's hearing. Aki-ER-19. The court then concluded:

> [A]s to this defendant, I think there is by [a] preponderance of the evidence sufficiently reliable evidence based on the statement made by Mr. Alo-Kaonohi that Mr. Aki was aware of the phone, obviously given the events that happened, I think, and what you could hear, I can't imagine he didn't hear that there was conversations about the phone between [C.K.] and – and Mr. Alo-Kaonohi. And so I do find sufficient evidence for the obstruction enhancement to apply.

Aki-ER-19.

Notably, Aki does not challenge the reliability of the evidence on which the district court relied; he simply alleges that the court's findings were not specifically tied to *his* conduct. *See* Aki Br. 18. But the record clearly belies this argument. The court's determination that Aki's conduct met the standard for the enhancement to apply was not clearly erroneous, and this Court should reject Aki's argument that the court procedurally erred. *See United States v. Barbosa*, 906 F.2d

1366, 1370 (9th Cir. 1990) ("[A] court reviewing the imposition of a sentence under the Guidelines should give . . . 'due deference to the district court's application of the Guidelines to the facts.'") (quoting 18 U.S.C. 3742(e)).

B. A district court need not make express findings to apply the obstruction-of-justice enhancement where a defendant destroys evidence.

Furthermore, Aki incorrectly asserts that the district court abused its discretion in applying the obstruction enhancement because the court was required to make "express findings on each element of obstruction of justice." Aki Br. 12 (citing *United States v. Herrera-Rivera*, 832 F.3d 1166, 1174 (9th Cir. 2016); *United States v. Castro-Ponce*, 770 F.3d 819 (9th Cir. 2014)). But Aki misreads this Court's precedent.

Section 3C1.1 of the Sentencing Guidelines covers a wide range of conduct such as "committing, suborning, or attempting to suborn perjury" and "destroying or concealing or directing or procuring another person to destroy or conceal evidence that is material to an official investigation or judicial proceeding . . . , or attempting to do so." Sentencing Guidelines § 3C1.1 comment. (n.4(b) & (d)). The cases Aki relies on hold that the district court must make express findings only on each element of *perjury* before that conduct may be deemed obstructive. *See Herrera-Rivera*, 832 F.3d at 1174 (quoting *Castro-Ponce*, 770 F.3d at 822). This is so because without express findings on each element of perjury, "the defendant's

substantial rights to take the stand and testify in his own defense may be chilled, calling the fairness and integrity of the proceedings into question." *Ibid.*

The same concerns, however, do not apply to other types of covered conduct, such as destroying evidence. *See* Aki Br. 13 (recognizing that "distinct conduct" requires "a distinct analysis" and that therefore cases addressing perjury "are inapplicable"). Recognizing as much, this Court's precedent does not require a sentencing court to make express findings before holding that other covered conduct is obstructive. *See, e.g.*, *United States v. Franklin*, 18 F.4th 1105, 1127 (9th Cir. 2021) (holding that the district court's implicit findings related to the obstruction-of-justice enhancement were sufficient for appellate review where the obstructive conduct consisted of the defendant's attempts to influence his co-defendants' testimony), *cert. denied*, 143 S. Ct. 219 (2022); *United States v. Gardner*, 988 F.2d 82, 83 (9th Cir. 1993) ("[T]he district court need not specify the reasons for its factual finding of obstruction of justice.") (citations omitted). Accordingly, this Court should reject Aki's argument that the district court had to make express findings before applying the obstruction-of-justice enhancement to his conduct.

V. The district court erred in holding that it could not apply Sentencing Guidelines § 3A1.1(a) without a special jury finding (government's cross-appeal).

The district court erred in holding as to both defendants that it could not apply Sentencing Guidelines § 3A1.1(a) without a special jury finding. This Court has recognized that, where, as here, the defendant was convicted of a hate crime, *i.e.*, the defendant acted because of the victim's protected characteristic, the jury need not make a special finding as to victim selection for the enhancement to apply. Accordingly, this Court should remand to the district court for resentencing.

A. The hate-crime enhancement applies to offenses that are hate crimes.

Sentencing Guidelines § 3A1.1(a) applies a three-level adjustment when "the finder of fact at trial . . . determines beyond a reasonable doubt that the defendant intentionally selected any victim . . . as the object of the offense of conviction because of the actual or perceived race . . . of any person." The district court reasoned that the enhancement cannot apply, even when a jury convicts a defendant of a hate crime, unless the jury makes a special additional finding beyond a reasonable doubt that a defendant "intentionally selected" the victim because of race. 5-ER-922-924.

Contrary to the district court's conclusion, there is no textual basis to apply the hate-crime enhancement only to certain hate crimes. As the commentary to the enhancement makes plain, the Guideline "applies to offenses that are hate crimes."

Sentencing Guidelines § 3A1.1, comment. (n.1). That is, the Guideline applies to *all* hate crimes.

B. The jury's verdict that defendants violated Section 249(a)(1) sufficed to apply the hate-crime enhancement.

1. The district court should have applied the hate-crime enhancement based on the jury's verdict finding defendants guilty beyond a reasonable doubt of violating Section 249(a)(1).

This Court has specifically rejected the argument that a jury must make a special finding as to selection before imposing the hate-crime enhancement. *See United States v. Armstrong*, 620 F.3d 1172, 1174-1175 (9th Cir. 2010). In *Armstrong*, the defendant was convicted of a civil rights conspiracy and a substantive hate crime for a racially motivated assault that sought to interfere with the victim's federally protected rights. 620 F.3d at 1174-1175. At sentencing, the court imposed a three-level upward adjustment under Sentencing Guidelines § 3A1.1(a) and the defendant appealed, arguing that "the district court should have been required to make a separate finding as to *selection* [of the victim] before imposing the enhancement." *Id.* at 1175.

This Court rejected the argument that a separate finding was necessary because it "misses the point" of the Guideline. *Armstrong*, 620 F.3d at 1176. The purpose of Section 3A1.1(a), this Court stated, "is to punish those who have a hate crime motivation and to deter future hate crimes." *Ibid.* Thus, it is "sufficient

reason to impose the enhancement" where the jury "was asked to and did find that Smith was the victim of Armstrong's attack because of his race." *Ibid.* A jury need not make an independent finding as to selection. *Ibid.*

Likewise, in *United States v. Smith*, this Court held that there is "no textual basis for applying a different standard to the sentencing than to the conviction for hate crimes." 365 F. App'x 781, 788 (9th Cir. 2010). There, the defendant had argued that the hate-crime enhancement did not apply because, before 2010, the background commentary to the Guideline indicated that the enhancement applied only if the primary motivation for the offense was the race of the victim. *Ibid.* This Court rejected that argument, explaining that "the Guideline language was developed to carry out Congress's directive . . . to provide a sentencing enhancement 'for offenses that the finder of fact at trial determines beyond a reasonable doubt are hate crimes.'" *Ibid.* (quoting Section 280003 of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796). The Court held the hate-crime enhancement applied because the jury had found that race was "a substantial motivating factor" for the offense conduct. *Ibid.*[10]

[10] Until 2010, the Guideline's background note stated that the enhancement applies when "the defendant had a hate crime motivation (*i.e.*, a primary motivation for the offense was the race . . . of the victim)." *See* Sentencing Guidelines § 3A1.1(a) (2009). In response to *Smith*, the Department of Justice

2. This Court's precedent is also consistent with that of other courts of appeals. The Tenth Circuit has held, for example, that the hate-crime enhancement clearly applied where the defendant pled guilty to an indictment charging him with conspiring to violently interfere with a federally protected right because of the victim's race, which necessarily included a showing of racial motivation. *See United States v. Woodlee*, 136 F.3d 1399, 1413-1414 (10th Cir. 1998). The court added that it was "inconceivable" that the defendant "did not 'select' his victims because of their race" where the facts demonstrated that the defendant "chose to point and fire a rifle at a car with three people in it because of the color of their skin." *Id.* at 1414. At least two other circuit courts have reached similar holdings. *See, e.g.*, *In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d 93, 153 (2d Cir. 2008) (explaining that "the very fact" that the defendant was convicted of

---

urged the Sentencing Commission to delete the word "primary." *See* Director, Off. of Pol'y and Legis., Letter to United States Sentencing Commission on Proposed Amendments (Mar. 2010), available at https://perma.cc/E3LG-VE62. The Commission agreed, explaining that the parenthetical was "unnecessary" because it simply "provided an example of 'hate crime motivation.'" *See* Sentencing Guidelines § 3A1.1, Editor's and Revisor's Notes – 2010 Amendments. The Commission's explanation for the amendment further supports reading the hate-crime enhancement to apply to all hate-crime offenses, not just some subclassification thereof. The enhancement certainly applies where, as here, the jury is instructed that, in order to convict, it must find beyond a reasonable doubt that the defendant acted because of the victim's race, *i.e.*, that the victim's race was a but-for cause of defendant's conduct. *See Burrage v. United States*, 571 U.S. 204, 212-213 (2014); 1-ER-43.

a hate crime "justifies the application of the . . . enhancement[]"); *United States v. Pospisil*, 186 F.3d 1023, 1031 (8th Cir. 1999) (rejecting the defendant's argument that the jury had to make a special finding about selection where the jury found that the defendant took part in a conspiracy to interfere with the rights of the victims "on account of their race, color, or national origin").

3. Here, the district court instructed the jury that "Count One of the indictment charged both defendants with a hate crime—that is, it charges both defendants with violating the law by assaulting C.K. because of his actual or perceived race or color." SER-43. The court further instructed the jury that, to find the defendants guilty of that crime, the jury had to find beyond a reasonable doubt that "the defendant acted 'because of' C.K.'s actual or perceived race or color." 1-ER-43. As in *Armstrong*, although "the jury was not asked to find that [the defendants] personally selected [the victim]," the jury's verdict, under the instructions given at trial, was "sufficient reason to impose the enhancement" where the because-of-race element was met. 620 F.3d at 1175.

Moreover, defendants' base offense levels resulted from the application of Sentencing Guidelines § 2H1.1 (offenses involving individual rights), which instructs a sentencing court to apply the guideline applicable to any underlying offense—here Section 2A2.2 (aggravated assault). Sentencing Guidelines § 2A2.2 applies to all aggravated assaults and contains no additional punishment for

assaults that target victims based on their race. Thus, in the absence of the enhancement, the defendants "would incur no additional penalty for the 'discrete harm' of targeting [the] victim[] based on their [race]." *See Terrorist Bombings*, 552 F.3d at 153.

Indeed, had the court applied the hate-crime enhancement, the defendants would have had a total base offense level of 28, which would have resulted in recommended prison sentences of 97-121 months for Alo-Kaonohi (as compared to 70 to 87 months) and 78-97 months for Aki (as compared to 57 to 71 months). *Cf.* 5-ER-945 *and* Aki-ER-19-20 *with* Sentencing Table, Sentencing Guidelines § 5A. But the court sentenced Alo-Kaonohi and Aki to only 78 months' and 50 months' imprisonment, respectively. 1-ER-3; Aki-ER-5. This error was not harmless because the court indicated that it would have imposed the enhancement, and thus calculated defendants' sentences based on these higher recommended ranges, had it not been under the erroneous impression that it lacked authority to do so. *See* 5-ER-968-969.

The district court's failure to apply the three-level adjustment contradicts both the text and purpose of Section 3A1.1(a)—that is, "to punish those who have a hate crime motivation and to deter future hate crimes." *See Armstrong*, 620 F.3d at 1176.

4. Finally, practical considerations also support remanding for resentencing. Section 3A1.1(a) "reflects [Congress's] directive to the Commission . . . to provide an enhancement of not less than three levels for an offense when the finder of fact at trial determines beyond a reasonable doubt that the defendant had a hate crime motivation." Sentencing Guidelines § 3A1.1, comment. (backg'd.). In implementing this directive, the Sentencing Commission could not have intended to create a requirement that could have the effect of leading to jury confusion or acquittals. But that is the likely result of the district court's holding. Having to present a special finding to the jury that means essentially the same thing as an element of the offense (but is worded differently) would create practical problems. If a jury is asked to find, first, as an element of a hate crime, that the defendant acted "because of race" and then, as a special finding, that the defendant selected the victim because of race, the jurors would likely assume that these two things must have different meanings. This would be like asking the jury to find six, and then to find a half dozen. Section 3A1.1(a) should not be interpreted in a way, contrary to both precedent and purpose, that injects jury confusion into a case and quite possibly results not only in lower penalties but also acquittals.

Congress's directive that enhanced penalties should apply where the defendant had a hate-crime motivation is met where, as here, the jury finds beyond

a reasonable doubt that the defendant acted because of the victim's protected characteristic. The district court erred in not applying the enhancement.

CONCLUSION

For the foregoing reasons, this Court should affirm defendants' convictions, vacate defendants' sentences, and remand the case to the district court for resentencing.

Respectfully submitted,

CLARE E. CONNORS
United States Attorney
District of Hawaii

CRAIG S. NOLAN
Assistant U.S. Attorney
United States Attorney's Office
Room 6-100
PJKK Federal Building
300 Ala Moana Blvd.
Honolulu, Hawaii 96850
(808) 541-2850

KRISTEN CLARKE
Assistant Attorney General

s/ Yael Bortnick
ERIN H. FLYNN
YAEL BORTNICK
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 616-8271

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 23-373, 23-416, 23-635

I am the attorney or self-represented party.

This brief contains 14,262 **words,** including 0 words manually counted in any visual images, and excluding the items exempted by FRAP 32(f). The brief's type size and typeface comply with FRAP 32(a)(5) and (6).

I certify that this brief *(select only one)*:

- ○ complies with the word limit of Cir. R. 32-1.
- ◉ is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- ○ is an **amicus** brief and complies with the word limit of FRAP 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- ○ is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- ○ complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
  - ☐ it is a joint brief submitted by separately represented parties.
  - ☐ a party or parties are filing a single brief in response to multiple briefs.
  - ☐ a party or parties are filing a single brief in response to a longer joint brief.
- ○ complies with the length limit designated by court order dated ____.
- ○ is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/ Yael Bortnick **Date** 2/14/2024
*(use "*s/[typed name]*" to sign electronically-filed documents)*